

Message Text

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ORIGIN EB-11

INFO OCT-01 ARA-16 ISO-00 L-03 H-03 COME-00 JUSE-00

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ARA/ECP:WHFAULKNER

ARA/PLC: MR. KRIENDLER (SUBS)

----- 121775

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FM SECSTATE WASHDC

TO AMEMBASSY PORT AU PRINCE

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TAGS: EFIN, EIND, HA

SUBJECT: PRIVATE COMMERCIAL DISPUTES WITH GOH

REF: (A) PORT AU PRINCE 1504; (B) 10 FAM 988; (C) STATE

A 10523 DATED 12/28/73

1. IN RESPONSE TO ACTION REQUESTED, WE ARE POUCHING REFS
(B) AND (C) AND OTHER CIRCULAR COMMUNICATIONS GIVING
GUIDANCE ON INVESTMENT DISPUTE SETTLEMENT, BASIC MATERIALS
ON ICSID AND MATERIALS ON OTHER ORGANIZATIONS FOR SETTLE-
MENT OF INTERNATIONAL ECONOMIC DISPUTES.

2. THE FOLLOWING INTERNATIONAL ORGANIZATIONS ASSIST BOTH
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DEVELOPED AND DEVELOPING COUNTRIES BY FACILITATING INVEST-

MENT DISPUTE SETTLEMENT THROUGH PROMPT AND IMPARTIAL
ARBITRATION:

(A) INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES (ICSID). AS OF JUNE 30, 1973, 68 STATES HAD
SIGNED ICSID'S CONVENTION AND 65, INCLUDING USG HAD

RATIFIED IT. THOUGH ICSID HAS HAD FEW CASES SUBMITTED
FOR ARBITRATION IN ITS EIGHT YEARS, IT APPEARS TO BE WELL
DESIGNED FOR THE SETTLEMENT OF INVESTMENT DISPUTES.
(FYI: ONLY BARBADOS AND JAMAICA IN LATIN AMERICA ARE
CURRENTLY PARTIES. END FYI)

(B) INTERNATIONAL CHAMBER OF COMMERCE COURT OF ARBITRA-
TION. THIS COURT HAS BEEN IN EXISTENCE SINCE 1923 AND
HAS A GOOD RECORD IN THE SETTLEMENT OF VARIOUS TYPES OF
INTERNATIONAL ECONOMIC DISPUTES. IT HAS NATIONAL COMMIT-
TEES IN 41 COUNTRIES, WITH MEMBERS IN 23 OTHERS.

(C) INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION.
IACAC HANDLES ALL TYPES OF INTERNATIONAL ECONOMIC DISPUTE.
IT WAS ORGANIZED IN 1934 AND HAS NATIONAL OFFICES THROUGH-
OUT THE WESTERN HEMISPHERE, INCLUDING ONE IN PORT AU
PRINCE.

3. A DESIRABLE MEANS OF ANTICIPATING POSSIBLE DISAGREE-
MENTS BETWEEN HOST GOVERNMENTS AND FOREIGN INVESTORS
WOULD BE TO INCLUDE LANGUAGE IN THE CONTRACT BETWEEN THE
HOST GOVERNMENT AND THE FOREIGN INVESTOR WHICH PROVIDES
FIRM AGREEMENT IN ADVANCE ON IMPARTIAL DISPUTE SETTLEMENT
PROCEDURES.

4. INVESTMENT DISPUTES CAN BE SUBMITTED TO ARBITRATION
WITHOUT ADVANCE AGREEMENT IF BOTH PARTIES SUBSEQUENTLY
AGREE TO THIS COURSE OF ACTION, BUT IT IS MORE PRACTICAL
TO HAVE AN AGREEMENT TO ARBITRATE IN EFFECT BEFORE A
DISPUTE ARISES.

5. ARBITRATION SPARES HOST COUNTRY JUDICIAL AND ADMINIS-
TRATIVE AGENCIES TIME FOR OTHER DUTIES AND SHIELDS THEM
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FROM CHARGES OF BIAS FROM UNSATISFIED CLAIMANTS.

6. SETTLEMENT BY AN IMPARTIAL TRIBUNAL USING AGREED UPON
PROCEDURES MINIMIZES RISK OF GOVERNMENT TO GOVERNMENT
CONFRONTATIONS.

7. NONE OF THESE DISPUTE-RESOLUTION DEVICES NECESSARILY
REQUIRES RELIANCE ON FOREIGN SUBSTANTIVE LAWS AND

REGULATIONS, SINCE THE AGREEMENT TO ARBITRATE CAN ALSO
CONTAIN AGREEMENT REGARDING WHAT LAWS ARE TO BE APPLIED.

THE MAIN OBJECT AND EFFECT OF THESE THIRD PARTY
APPROACHES TO SETTLEMENT OF INVESTMENT DISPUTES IS TO

INSURE BOTH THE FACT AND THE APPEARANCE OF IMPARTIALITY
AND THEREBY TO ENHANCE CONFIDENCE IN THE FAIRNESS OF THE
OUTCOME. THIS CONFIDENCE IS A VERY IMPORTANT ELE-
MENT IN CREATING THE KIND OF ATMOSPHERE THAT WILL ATTRACT
FOREIGN INVESTORS AND CREATE A CONSTRUCTIVE RELATIONSHIP
BENEFICIAL TO ALL PARTIES.

8.

IN REGARD TO ICSID, HAITI, GENERALLY, MUST ADHERE TO THE
ICSID CONVENTION BEFORE IT CAN BE A PARTY TO ARBITRATION
OR CONCILIATION PROCEEDINGS BEFORE ICSID (AND THE OTHER
PARTY MUST BE A NATIONAL OF ANOTHER CONTRACTING STATE:
A LIST OF CONTRACTING STATES IS BEING POUCHED). FYI:
ICSID HAS INDICATED WILLINGNESS TO ALLOW USE OF ITS
FACILITIES FOR CERTAIN DISPUTES BETWEEN FOREIGN INVESTORS
AND NON-CONTRACTING STATES. END FYI. ADHERING TO THE
CONVENTION HAS IMPORTANT ADVANTAGES. IT SHOWS AN ATTITUDE
TOWARD FAIR TREATMENT OF FOREIGN INVESTMENT WHICH CREATES
A FAVORABLE INVESTMENT CLIMATE. AN ICSID AWARD IN FAVOR
OF HAITI CAN EASILY BE ENFORCED IN THE COURTS OF OTHER
CONTRACTING STATES. FRENCH IS AN OFFICIAL LANGUAGE OF
ICSID. (A SET OF MATERIALS ON ICSID IN FRENCH WILL BE
POUCHED.) FYI: HAITI MUST BE AWARE OF THE PROBLEMS
JAMAICA IS NOW HAVING WITH ICSID. THREE ALUMINUM COMPANIES
HAVE INSTITUTED AN ACTION THERE AGAINST THE GOJ'S UNILA-
TERAL TAX HIKE IN VIOLATION OF CONTRACTUAL OBLIGATIONS.
JAMAICA HAS TAKEN ACTIONS WHICH CAN BE CONSTRUED AS
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ATTEMPTING TO REMOVE CASES INVOLVING ITS NATURAL RESOURCES
FROM ICSID JURISDICTION. THE USG DOES NOT BELIEVE THIS
IS POSSIBLE UNDER THE CONVENTION. THIS SITUATION MAY
MAKE HAITI WARY OF ICSID. HOWEVER, IT CAN BE POINTED OUT
THAT MERE ADHERENCE TO THE CONVENTION WITHOUT A CONTRAC-
TUAL OBLIGATION WITH THE FOREIGN INVESTOR TO ARBITRATE
DOES NOT OBLIGATE THE GOH TO ARBITRATE ANY PARTICULAR
DISPUTE. RATHER, CONSENT TO ARBITRATION MUST BE IN
WRITING AND INCLUDED SPECIFICALLY IN AN INVESTMENT AGREE-
MENT BEFORE ANY SUCH OBLIGATION ARISES. END FYI. KISSINGER

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